

COMMUNITY AFFAIRS

Division Of Codes And Standards

Uniform Construction Code; Construction Boards of Appeals

Construction Permits; Standards Forms; Duties of Construction Officials; Hourly Charges for Development-Wide Inspection of Homes; Hearing Procedures

Adopted Amendments: N.J.A.C. 5:23-1.4, 2.14, 2.16, 4.5, 4.17, 4.18 and 4.20 and
5:23A-2.2

Adopted New Rule: N.J.A.C. 5:23-2.35

Proposed: May 1, 2006 at 38 N.J.R 1789(a) .

Adopted: , 2006 by Susan Bass Levin, Commissioner,
Department of Community Affairs.

Filed: , 2006 as R.2006, d. , **with a technical change** not requiring
additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 52:27D-124, 52:27D-198 and 40:55D-53.2a.

Effective Date: , 2006.

Expiration Date: January 15, 2008. (5:23); November 12, 2006 (5:23A).

SUSAN BASS LEVIN, Commissioner

Summary of Public Comments and Agency Response: : **Comments were received**
from the following persons and organizations: Patrick J. O'Keefe, Executive Vice
President and Chief Executive Officer, New Jersey Builders' Association; Casey
Guagenti, President, New Jersey Burglar and Fire Alarm Association; and Joel Schneider,
Esq., Archer & Greiner.

COMMENT: The proposed requirement that a developer pay the cost of
development-wide inspections after a certificate of occupancy has been issued must not
apply to instances where the Department has entered into a settlement agreement with a
developer regarding inspections for past violations, and the rules should not be applied
retroactively in any such case to require reimbursement for inspection of any house that
has already been built. The Department should make it clear that the proposed rule
changes would not apply to a development which is already the subject of a settlement
agreement that addresses home inspections. (Schneider)

RESPONSE: The procedure authorized by this amendment would not apply to a
case that has been settled and for which a procedure for assuring correction of defects has
been established.

COMMENT: The proposed rule should also not apply to homes already built, since the added inspection fees were not taken into account in setting the price of the home. (Schneider)

RESPONSE: Builders generally try to avoid building homes with defects, rather than taking into account the anticipated cost of correcting defects when they set the price. Furthermore, the rule would only apply to homes after they are built, since it involves inspection after the issuance of a certificate of occupancy.

COMMENT: Burglar and fire alarm installers should be included, along with architects and engineers, as licensed professionals who can be hired to perform services in connection with a development-wide inspection.(Guagenti)

RESPONSE: Engineers and architects are the professionals listed because they are qualified to supervise construction generally. There are many building-related professions or occupations for which licensing or registration is required. It would be up to the engineer or architect to consult with persons having specialized expertise if and when necessary.

COMMENT: Inspection fees paid when the home was built should be refunded or credited if the local enforcing agency failed to do the job that it was paid to do. (Schneider)

RESPONSE: If there are any defects that the local enforcing agency failed to identify, that should not result in any refund to the builder. The party who is disadvantaged by any failure to detect code violations is the homeowner, not the builder, and the remedy that the homeowner needs is correction of the violations, not a refund of the inspection fee. Inspection by the local enforcing agency is not intended to be a substitute for quality control by the builder.

COMMENT: The proposed rule at 5:23-2.35(a)1. should be revised to allow the construction official to inspect a representative sample of homes in a development to determine whether there is a pattern of violations. As written, the rule will lead the construction official to conclude that each and every home must be inspected. (Schneider)

RESPONSE: A code official can only make a determination of the existence of a pattern of violations by checking a reasonable sample of homes. It would only be after such a determination that an order for development-wide inspection would be issued.

COMMENT: The following sequence should be followed after the construction official determines that development-wide post-CO inspections are required: (1) notification of the builder, with an opportunity for the builder to provide evidence that the violation is an isolated condition; (2) if the builder fails to respond, notification to owners and conducting of the inspections; (3) if the builder responds but the Department is not persuaded by his response, the builder would have the opportunity to contact the

owners to advise of the possible existence of a code violation and of the need for inspection to determine if repairs are required, the builder's notice to include the owner having the choice of either inspection and repair by the builder, subject to subsequent inspection by the construction official, or inspection by the construction official or designee and issuance of a notice of violation to the owner and builder.(O'Keefe)

RESPONSE: The intent of this rule is to establish a process whereby serious violations affecting many houses in a development can be found and corrected in an expeditious manner. The builder would have the opportunity to appeal the order for a development-wide inspection to the construction board of appeals. While the builder should certainly address violations in individual homes as soon as they are brought to the builder's attention, such a response cannot be a substitute for development-wide inspections when a pattern of violation is found to exist. The rule is being amended on adoption to make it clear that the construction official is to ensure the inspection of all units in the development by issuing a notice and order to that effect. That notice and order would be subject to appeal to the construction board of appeals.

COMMENT: Escrow accounting should be improved to include a requirement that statements be provided to the builder that show the address of each inspected unit, the hourly rate charged, the hours billed for each inspected unit, the type and nature of the inspection and the itemized actual out-of-pocket expenses of any hired consultant. (O'Keefe)

RESPONSE: The rules follow the provisions of the Municipal Land Use Law regarding developer escrows. Under those procedures, a professional is required to provide billing information both to the municipality and to the developer. The procedures have thus far been found to be workable. If sufficient information is not provided, the rules give the developer the right of appeal to the construction board of appeals. Should problems arise in the application of these procedures to development-wide inspections, the Department will certainly consider recommendations for amendment.

COMMENT: Construction officials should be regularly reminded to retain approved plans and related documents for ten years, and copies of original documents should be made available to both the builder and the occupant. Retention of these plans and other documents is necessary in order to determine if violations existed prior to the issuance of the CO or arose subsequently as a result of acts of persons other than the builder. (O'Keefe)

RESPONSE: The State Uniform Construction Code and approved record retention schedules already require that building plans be retained for ten years. Code officials are expected to comply with these requirements in the same way that they are expected to comply with all other code requirements.

COMMENT: Penalties should not be issued to builders for any post-CO violations for which claims are being handled under the new home warranty. (O'Keefe)

RESPONSE: The obligation of a builder to deliver a building that is code-compliant is independent of whether the homeowner files a warranty claim. A homeowner should have the right to file a complaint with a public official without thereby being deemed to have elected a remedy other than the new home warranty, as would be the case if the homeowner filed a lawsuit.

COMMENT: Form F214 should be modified so that it is clear that no penalty should be assessed until a reasonable time to comply, as specified in the initial notice, has expired. (O’Keefe)

RESPONSE: The reference to the need to comply by a certain date in order to avoid penalty is contained in Form F213, the issuance of which would precede the issuance of Form F214. Form F214 is the penalty notice, not the initial notice of violation.

COMMENT: In any case where it is obvious to the construction official that post-CO violations are the result of either action or inaction by the owner, or anyone else other than the builder, the notice of violation should be issued only to the owner. (O’Keefe)

RESPONSE: A notice of violation or penalty notice can only be issued to a person who is responsible for a violation. If a builder can demonstrate that the violation was created after he delivered the house, and was caused by someone not under his supervision or control, the builder would not be held liable.

COMMENT: Fees charged by contracted professionals should not exceed those charged when a construction official performs the inspection. To that end, the proposal should be amended to provide that the fees shall not exceed an hourly amount equal to twice the hourly base salary paid to any licensed code official in the municipality. (O’Keefe)

RESPONSE: It is unfortunately true that qualified professionals in the private sector tend to be paid considerably more than equally qualified professionals in the public sector. If the limitation proposed by the commenter were adopted, it would be impossible to implement this rule with private professional contractors.

Federal Standards Statement

No Federal standards analysis is required because this amendment is not being adopted in order to implement, comply with, or participate in any program established under, Federal law or a State law that incorporates or refers to Federal law, standards or requirements.

Full text of the adoption follows (additions indicated in boldface with asterisks **thus**).

5:23-2.35 Enforcement actions in residential developments after issuance of certificate(s) of occupancy

- (a) Subsequent to the issuance of a certificate of occupancy, the construction official shall issue a notice of violation for any violation of the provisions of the Code in effect at the time of permit application that comes to his or her attention.

Pursuant to N.J.A.C. 2A:14-1.1, no notice of violation may be issued to the developer or to any contractor more than 10 years after issuance of the certificate of occupancy.

- (b)

1. If violations of any of the following provisions of the Code in effect at the time of permit application are found in a residential structure in a development, other than Group R-1, subsequent to the issuance of a certificate of occupancy, the construction official shall ***issue such notices and orders as may be necessary*** to ensure that all units within the development that might have similar violations are inspected for such violations

1.- 2. (No change.)